IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 38

RAYMOND C. ARMSTRONG,

Petitioner,

v.

MARY R. ARMSTRONG,
GENERAL MOTORS CORPORATION, et al.,

Respondents.

PETITION FOR REHEARING

ROBERT N. GORMAN,
JAMES W. HENGELBROK,
805 Tri-State Building,
Cincinnati 2, Ohio,

JULIUS R. SAMUELS,
918 First National Bank Bldg.,
Cincinnati 2, Ohio,

Attorneys for Petitioner.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

INDEX

	PAGE
I. Opinion Concerning Florida Decree	1
II. Separate Concurring Opinion	3
III. Opinion Concerning Constitutional Question	4
Conclusion	7

CITATIONS

CASES:

Friedberg v. United States, 347 U. S. 916; 347 U. S. 1006, 348 U. S. 142	8
Haddock v. Haddock, 201 U. S. 562	5
Hess v. Pawloski, 274 U. S. 352	5, 7
International Shoe Co. v. Washington, 326 U. S. 310, 316	6
Milliken v. Meyer, 311 U. S. 457	6, 7
Mulane v. Hanover Bk. & T. Co., 339 U. S. 306	5
Pennoyer v. Neff, 95 U. S. 714	6, 7
Williams v. North Carolina, 317 U. S. 287	7

OTHER:

Ohio Jurisprudence (2d), Vol. 18, p. 6	4
Ohio Revised Code, Sec. 3105.03 (formerly Sec. 8003-3, Ohio General Code, formerly Sec. 11980, Ohio General Code)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 38

RAYMOND C. ARMSTRONG,

Petitioner,

v.

MARY R. ARMSTRONG,
GENERAL MOTORS CORPORATION, et al.,

Respondents.

PETITION FOR REHEARING

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

Petitioner respectfully submits that there are errors of both law and fact in the three opinions rendered in this cause on April 9, 1956. But for these erroneous statements, the case did "raise an important problem in the construction of the Full Faith and Credit Clause" which this court has left unanswered.

I.

In the majority opinion of Mr. Justice Minton it is stated that the Florida decree did not deny alimony to the respondent, but "we should construe its action as a refusal to pass on the question of alimony and thus avoid

the constitutional question as to its power to do so." Previously eleven judges in Ohio, who are now joined by four on this court, had held that the Florida decree did deny alimony.

While it could be true that the five are right and the fifteen are wrong, however, such odds should cause some of the five to doubt whether in that interpretation of the Florida decree they are even 51% right, as Justice Brandeis once said judges hope their conclusions are.

At least it should call for a re-examination of the Florida decree, not in a vacuum as the majority did, but in connection with other admitted facts and cases. Once this examination is made, it is obvious that the interpretation placed on the Florida decree by the majority is clearly wrong.

On October 2, 1951, when the Florida court entered its decree concerning divorce and alimony (R. 246), an action, filed on June 15, 1951 (R. 236), by Mrs. Armstrong, was pending in Ohio to partition the jointly owned real estate which was situated in Ohio. The Florida court could not determine the interests of the parties in that matter. Secondly, Mrs. Armstrong had taken the actual stock certificates, although unendorsed, to Ohio. She contended, in letters, that she had a right to possession of the certificates (R. 299). The Florida court could not reach up into Ohio and get that stock or make a decree about the certificates. The ownership of the Ohio real estate and the claim of equitable ownership to the unendorsed certificates had to be decided by the Ohio courts. *There was not, however, on October 2, 1951, any alimony action or even contemplated action for alimony and support filed in Ohio.* The divorce and alimony action was not filed by Mrs. Armstrong until February 1, 1952 (R. 13), after she had established a one year's residence in Ohio, which she did not have on October 2, 1951 (R. 46).

All the Florida court attempted to say was that the ownership of the real estate in Ohio, where a partition suit was pending, and the equitable claim of ownership of the stock, had to be decided by the Ohio courts, and could not be decided by the Florida court. However, in regard to any claim for *alimony, support* and *maintenance*, which is not a claim for specific property, such alimony claim was denied, and all rights in the Florida real estate were vested in the petitioner. That is the only construction that can be made of the Florida decree set forth on pp. 248-249 of the record. The Florida court merely recognized pending claims for property to real estate and intangibles then situated in Ohio, but specifically said and decreed "no award of alimony be made to the defendant."

This decree held that no award of alimony be made, but specifically held her rights to real estate by way of partition (the partition action had been filed June 15, 1951, R. 303) and her equitable claim to possession of the stock certificates taken by her (R. 297), being entirely separate and apart, were to be decided by the Ohio courts. An alimony action neither in Florida nor in Ohio is one for specific property. It is in both states an award for support *solely*. How the majority could so misconstrue the Florida decree it is difficult to understand, except that it was construed without reference to the pending claims of respondent in Ohio, which were of an entirely different nature than claims for alimony and support. To construe the decree in Florida otherwise is to read into it things that neither are there nor could be there.

II.

The separate concurring opinion of Mr. Justice Frankfurter is premised on the false assumption that alimony granted in Ohio is a division of property. The Ohio decree plainly shows on its fact that it was for alimony (R. 18), and was not in any sense a division of property.

Throughout the trial, the Court considered the issue as one of alimony (R. 129, 158, 168, 188), and respondent's counsel agreed that alimony was the issue:

> "The Court: I still don't see that that has any relevancy. Your claim is that this lady is entitled to a divorce. Your claim further is, as I take it, as your pleading set forth, that she is entitled to alimony.
> "Mr. Sibbald: That is right." (R. 158)

Alimony has been traditionally defined, in Ohio, as the "allowance which a husband may be compelled to pay to his wife for her maintenance when she is living apart from him, or has been divorced." 18 *Ohio Jur.* (2d) 6.

If alimony was denied in Florida it could not be granted in Ohio without disregarding the Full Faith and Credit Clause. The wife had a right to a division of the real estate in the partition suit, which has since been concluded, and a right to set up an equitable claim for ownership in the stock which she took to Ohio, but neither of those claims were in the nature of alimony. To make the distinction set forth in the separate concurring opinion is to hold that jurisdiction can be obtained by a wife who wrongfully takes unendorsed stock certificates out of the jurisdiction of the domicile. Jurisdiction should never be acquired by a wrongful act.

III.

While the opinion of Mr. Justice Black, concurred in by three other justices, rightfully states that the Florida decree denied alimony, its consideration of the full faith and credit clauses is clouded by three erroneous statements.

Petitioner never claimed "that it was impossible for Mrs. Armstrong to obtain a new domicile, separate and apart from that of her husband." Neither did petitioner ever claim that alimony depended "on which spouse is to blame in leaving the other." Neither separate domicile nor fault was involved in the argument of petitioner.

What petitioner claimed was that where a husband and wife lived in a state for twenty odd years, and had established their matrimonial domicile there, that the courts of that State had sufficient interest in the marriage relationship to completely settle all marital problems despite the fact that one spouse left the matrimonial domicile.

In the early days the courts of the matrimonial domicile were the only ones where the affairs could be settled. With the overruling of *Haddock* v. *Haddock*, 201 U. S. 562, all that was said was that the state of the matrimonial domicile did not have *exclusive* jurisdiction to settle the marriage ties. It never has been said, unless a future decision so holds, that the power of the matrimonial domicile to settle all of the family matters had completely been overruled.

We said that if a motorist, simply by using the highway, consents to personal jurisdiction in tort actions (*Hess* v. *Pawloski*, 274 U. S. 352), then certainly married couples who have lived twenty two years in a state have given their consent to the jurisdiction of that state to completely adjudicate their martial rights. As was said in *Mullane* v. *Hanover Bank & Trust Co.*, 339 U. S. 306, following the *International Shoe* case, such contacts were more than minimal, and were sufficient to hold that actual personal service was unnecessary.

Finally, the court makes this statement:—

> "The issue was tried in Ohio with both parties present, and the trial court expressly found that Mrs. Armstrong had returned to Ohio and was a 'resident' there within the meaning of the Ohio divorce statute at the time the Florida divorce proceedings were instituted. See Page's Ohio Rev. Code Ann., 1954, Sec. 3105.03. This statute has been uniformly interpreted by the Ohio courts to require residence accompanied by an intention to make the State of Ohio a permanent

home. See, e. g., *Saalfeld* v. *Saalfeld*, 86 Ohio App. 225, 89 N. E. (2d) 165. We would accept the Ohio court's finding that Mrs. Armstrong was such a resident of Ohio when the *Florida* suit was brought as amply supported by evidence in the record. Consequently the husband's reliance on *Milliken* v. *Meyer* is misplaced." (emphasis added).

The court fails to state that such a finding of residence was not made until July 18, 1953, (R. 16). The court fails to note that, at the time the *Florida* decree was granted (October 2, 1951), Mrs. Armstrong had not been a resident of Ohio for the one year period which is required, in order to bring an action for divorce and alimony, by the terms of Sec. 3105.03, Ohio Revised Code (formerly Sec. 8003-3, Ohio General Code, formerly Sec. 11980, Ohio General Code). See Record, p. 46. Therefore at the time of the hearing in Florida the legal rulings in *Milliken* v. *Meyer*, 311 U. S. 457, were clearly applicable.

We here refer to the statement in the concurring opinion (Frankfurter, J.) that the question, which petitioner raised and fifteen judges have decided was present, "would no doubt raise an important problem in the construction of the Full Faith and Credit Clause." The question has been clearly circumvented, we respectfully submit, not by the facts in the record, but by a misinterpretation of the record on the one hand, and by a failure to follow the lead of the late Chief Justice Stone in that the strictness of the rule in *Pennoyer* v. *Neff*, 95 U. S. 714 has given way to a test of "minimum contacts," and "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *State of Washington*, 326 U. S. 310, 316.

There is nothing, however, in *Pennoyer* v. *Neff* inconsistent with the position taken by petitioner, for if Florida did not have jurisdiction to *fully* settle the marital affairs of the parties Armstrong, the complaining party was with-

out redress. The rule that the four concurring justices would establish would permit any fleeing spouse, whether husband or wife, not only to go forum shopping, but at the same time render it impossible for the courts of any state to fully adjudicate all domestic differences. *Williams v. North Carolina* merely said that the matrimonial domicile did not have *exclusive* right to make this settlement, but it did not endorse a proposal that the matrimonial state was stripped of the power so to do, and thereby prevent any state to completely solve all problems arising out of the marriage, including not only its dissolution, but rights of support, maintenance and alimony.

We most respectfully submit that by this decision the questions of marriage, divorce and alimony in so called migratory cases is left in a chaotic state. In conclusion, we most respectfully submit that a slight paraphrase of the words of the late Chief Justice Vinson seem appropriate:

> "At best the operation of the rule(s) which the Court today enunciates for the first time may be expected to confound confusion in a field already replete with complexities." *Trapiano v. United States*, 334 U. S. 669, 716.

CONCLUSION

If the majority would simply re-read the Florida decree of October 2, 1951 in the light of the then pending actions this court would be in a position to pass upon the "important problem in the construction of the Full Faith and Credit Clause."

Upon re-argument it could be demonstrated that there is nothing in *Milliken v. Meyer*, 311 U. S. 457, *Hess v. Pawloski*, 274 U. S. 352 or the contention of the petitioner that conflicts with *Pennoyer v. Neff*, supra.

While it is rare that re-hearings are granted, counsel does feel encouraged that in recent years, one was granted, and while the final result was not all that could be desired, at least the chaotic condition existing in lower courts was removed. Cf. *Friedberg* v. *United States*, 347 U. S. 916, 917; 347 U. S. 1006; 348 U. S. 142. We can only submit that this court should again re-examine its previous conclusions, which we respectfully submit are not based on the facts or the law applicable.

Respectfully submitted,

ROBERT N. GORMAN,
JAMES W. HENGELBROK,
805 Tri-State Building,
Cincinnati 2, Ohio,

JULIUS R. SAMUELS,
918 First National Bank Bldg.,
Cincinnati 2, Ohio,

Attorneys for Petitioner.

CERTIFICATE

Robert N. Gorman, counsel for petitioner, hereby certifies that this petition for re-hearing is presented in good faith and not for the purpose of delay.

ROBERT N. GORMAN